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No. 06-1104

In The

Supreme Court of the United States

OLGA OSTOPOSIDES, et al.,

Petitioners,

v.

RICHARD GLIMP M.D. et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The decision of the Ninth Circuit Appellate Court should not be allowed to stand because it incorrectly suggests that there is **no** due process right to counsel in civil cases and civil indigent cases, which contradicts and violates all civil litigants' due process rights under the Fourteenth Amendment of the United States Constitution.

Respondents' opposition brief is *riddled* with misrepresentations that have been overwhelmingly proven to be false in petitioners' Writ of Certiorari. Not only have they misstated the facts of our case, but they have supported it with cases that are inapposite. These deliberate and inaccurate statements violate the purpose of filing an opposition brief, as spelled out under Rule 15 of this court, which states in pertinent part that *"Counsel are admonished that they have an obligation to the court to point out in their opposition brief any perceived misstatement of facts or law made in the petition."* However, instead, respondents have volitionally violated their obligation to this court under Rule 15 and have willingly *made* **misstatements of facts and law** regarding this case that have already been evidenced to be untrue, hence violating the very purpose of filing an opposition brief under Rule 15 of this court and thus showing contempt. Having prospered on their misrepresentations thus far, they are now hoping to prosper on those known volitional misrepresentations here in the U.S. Supreme Court.

REASONS FOR GRANTING THE WRIT

I. The issue of depriving a civil litigant of his due process right under the Constitution of the United States of America is an issue of great significance and public concern, which affects the rights of every civil litigant in the State of California under current conflicting appellate opinions, which contradict this U.S. Supreme Court as

well as the California State Supreme Court's long-standing precedent of guaranteeing that due process under the U.S. Constitution guarantees the right to a hearing, and that right includes the right to counsel in both civil and criminal cases.

The Ostoposides have not *accurately* asserted that they were deprived the right to have attorney representation, as respondents misrepresent to this court in their Opposition Brief, but the Ostoposides have *accurately* represented to the court that the due process clause of the Fourteenth Amendment of the U.S. Constitution, according to this U.S. Supreme Court, guarantees **all civil litigants** the right to an attorney. The judge allowed petitioners' attorney to withdraw on the eve of trial and **refused** to change the trial date so that another attorney could step in and represent petitioners, which left petitioners **unrepresented** at their Motion Summary Judgment hearing, and there the court disposed of petitioners' case. Petitioners ask this court whether the appellate court's ruling stating, "we know of no authority which even suggest a plaintiff in a medical malpractice case is entitled to be represented by counsel," backed by published appellate court opinions that state, "as a general rule, there is no due process right to counsel in civil cases" contradicts and violates all civil litigants' due process rights under the Fourteenth Amendment of the U.S. Constitution. Further, whether the court's refusal to change the trial date so an attorney could step in constituted a denial of a hearing and, therefore, a denial of due process in the constitutional sense, and finally, whether these civil petitioners, who were forced into an **involuntary pro per indigent status**, as well as every civil indigent in this nation, have a right under the due process clause of the U.S. Constitution to have a court-appointed attorney, and does not have to pay **any costs** under Federal Statute 28 USCA Section 1915.

In the present case, the Court of Appeal reached a

contrary conclusion stating the due process clause of the Constitution does not guarantee or embrace such a right when they stated, *"We know of no authority which even suggests a plaintiff in a medical malpractice case is entitled to be represented by counsel,"* backed by the published appellate court opinions that state, *"As a general rule, there is no due process right to counsel in civil cases."*. This long-standing precedent has been severely challenged by these published opinions of the appellate court in petitioners' case herein. (*People v. $30,000 United States Currency (1995) Cal.App. 4th 936, 942;)(Iraheta v. Superior Court (1999) 70 Cal.App 4th 1500, 1503; (Fallis v. Dept. of Motor Vehicles (1968) 264 Cal.App. 2d 373, 383.).*

These matters of conflicting opinions regarding these public policies are significantly affecting the administration of justice and the rights of every civil litigant in the State of California, and are denying the due process right of civil litigants under the U.S. Constitution. As an example of known misrepresentations by respondents to this court, respondents cite the opinion of the appellate court, which states, "We know of no authority which even suggests a plaintiff in a medical malpractice is entitled to be represented by counsel **and no such case has been cited by appellants**."

This statement (as well as *every* statement cited by respondents regarding the opinion of the appellate court in ROB) was already shown by petitioners to be an **inaccurate statement** on the appellate court's part towards them (Pet. App. E, 97a-107a, 88a-97a). As respondents well know and this court can see, the appellate court clearly *missed* the fact that not only did petitioners cite case authority, but they cited the highest case authority in the land, this U.S. Supreme Court. In petitioners' AOB, App. D, 55a, they state:

> In **Mendoza v. Small Claims Court, 49 Cal.2d 668 (1958)**, the court addressed the issue of whether the deprivation of a litigant's right to counsel constitutes

> a violation of due process wherein it stated: "The right to a hearing includes the right to appear by counsel." (citations omitted) In its consideration of the right to counsel in Powell v. Alabama, supra, the United States Supreme Court declared: "What then does a hearing include? Historically and in practice, in our country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. **Even the intelligent and educated layman has small and sometimes no skill in the science of law**... If in any case, **civil or criminal**, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and therefore of due process in the constitutional sense...(citations omitted). It is urged that depriving a litigant of the right of counsel is a violation of due process. There can be little doubt that in both **civil and criminal** cases the right to a hearing includes the right to counsel, and that the arbitrary refusal of such right constitutes a deprivation of due process."

This declaration by this U.S. Supreme Court regarding due process clearly evidences that civil litigants in a medical malpractice case have a due process legal right to be represented and heard by counsel in order to be afforded the right to a fair hearing under the U.S. Constitution.

In *Roa v. Lodi Medical Group* (1985) 37 Cal 3d 920, 925-926, the California State Supreme Court reaffirmed this U.S. Supreme Court's declaration of due process. The Roa opinion stated regarding the civil litigants in a medical malpractice case regarding due process and the right to

counsel in civil actions:

> Plaintiffs' Due Process argument rests on the claim that the statute impermissibly infringes on the right of medical malpractice victims to retain counsel in medical malpractice actions. (2) Although the right to be represented by retained counsel in civil actions is not expressly enumerated in the federal or state constitution. **Our cases have long recognized that the constitutional Due Process *guarantee* does embrace such a right** (See e.g. *Powell v. Alabama* (1932) 287 U.S. 45, 68-69 (77 Ed. 158, 170-171, 53 s.ct. 55, 84 A.L.R. 527); *Mendoza v. Small Claims Court* (1958) 49 Cal.2d 668, 673 (321 P. 2d 9); *Roa v Lodi Medical Group, supra*)

In the present case, as stated herein, the Court of Appeal reached a contrary conclusion, stating the due process clause of the Constitution does not guarantee or embrace such a right and backed it with the published opinions stated herein.

In respondents' Opposition Brief, page 8, they cite petitioners as ignoring the clear meaning of due process, as decided by this U.S. Supreme Court in *Powell* and declare: *"In making their arguments, petitioners ignore the clear meaning of this statement – it would violate due process of a civil or criminal litigant if the court refused to allow an attorney retained by the litigant to act on the litigant's behalf in court proceedings. Clearly, that did not occur here."*

However, in making their argument, it is not petitioners who are ignoring the clear meaning of this statement in *Powell*, but respondents who are *knowingly* misrepresenting it. Likewise, the authority cited by respondents in *Gideon* is inapplicable to the petitioners' case in that the rules laid down in *Gideon* were clearly applied only in criminal proceedings and have no bearing on a civil case. Further, their authority cited in *Betts*, *Scott* and *Lassiter* are clearly inapplicable to petitioners' civil case herein. It has clearly

been established by this court in *Powell*, as well as *Van v. Shilleh, 54 Cal.App.3d 192, 126 Cal.Rptr. 401 (1975)* and *Mendoza, supra*, which cite *Powell*, that petitioners have a right to counsel in civil cases.

In petitioners' case herein, the trial court abused its discretion in denying petitioners' motions for a continuance of the trial date in order to retain an attorney. The court based its denial on a fast-track policy against continuances without considering whether petitioners' case justified a departure from that policy. **(App. D, 47a-63a)** Appellants, in their Opening Brief, clearly evidence that by the trial court refusing to continue the trial date, none of the hundreds of attorneys these litigants spoke with could even consider taking their case. Hence, this denial by the trial court to continue the trial date in the face of the fact that no attorney could take the case clearly deprived these appellant litigants of their right to counsel, which is a violation of due process.

At the September 24, 2001, hearing concerning the withdrawal of attorney Lynn Moyer, Judge Romona See stated to petitioners, *"Don't expect that if you have counsel coming in here that they are going to come in and move to continue the trial date."* (RT A-10:19-21)

After the initial 30-day stay expired on October 31, 2001, petitioners came to court presenting overwhelming evidence to the court that petitioners had been advised by several prospective attorneys that until they had assurances that the court would give them adequate time to prepare this matter, because a unanimous belief existed among them that the case was severely underdeveloped and clearly not ready for trial (as it was a voluminous case with several defendants, had numerous motions summary judgments, mountains of discovery to be addressed, several depositions to be taken, and virtually no discovery sent out by the previous attorney for petitioners) neither they, nor any other competent attorney, would even consider taking the case. They further

stated and assured petitioners that their malpractice insurance would not allow them to take a case of this magnitude under the current time constraints of the trial date. (App. D, 38a)

Despite this fact, Judge Romona See stated, "*...I'm not going to continue the trial date...I'll grant an additional 30 days of stay, but that's it, ma'am. You've got to get going. If you can't find counsel, then you have got to start responding to this discovery yourself.*" (RT C-5:27-28, 17-20)

On December 3, 2001, petitioners returned to court having now spoken with hundreds of attorneys who expressed the same concerns the previous attorneys represented to petitioners during their first 30-day stay, and that was simply that due to the voluminous size and condition of the case, the trial date needed to be changed in order for them, or any other competent attorney, to be able to take the case. When petitioners offered to present their evidence of this, Judge Romona See **refused** to allow petitioners to file it. Ms. Ostoposides stated, ***"...If you would like evidence, I could certainly bring it in to you."***. Judge See stated, ***"...I'm not going to have you go back and file something else."*** Judge Romona See then stated, ***"You may be representing yourself in this trial, but I'm not continuing the trial date."*** (RT D-3:15-16, D-3:19-20, D-5 and 6:27-1)

True to her word, Judge Romona See did not change the trial date and left petitioners unrepresented at their Motion Summary Judgment hearing, where she then disposed of petitioners' case. As is clearly stated by this U.S. Supreme Court in *Powell*, *"There can be little doubt that in both civil and criminal cases the right to a hearing includes the right to counsel, and the arbitrary refusal of such right constitutes a depravation of due process."*

In *Van, supra* the Court of Appeal addressed issues identical to the ones presented herein:

> As we have indicated, the presiding judge made no effort to analyze the situation in which Mr. Shilleh

> found himself the denial by judge Southers was preemptory and based solely on a policy against continuances without considering whether the case before it justified a departure from that sultry policy...**Plaintiffs argue that a denial of a continuance is not a deprivation of Due Process of law, but the right to a hearing includes the right to appear by counsel.** (*Mendoza v. Small Claims Court* (1958) 49 Cal.2d 668, 673 (321 (200) p.2d 9) *Van v. Shilleh, supra*, p. 198-199)

Under these circumstances the trial court's refusal to change the trial date so an attorney could represent petitioners was tantamount to refusing to hear a party by counsel, and it reasonably may not be doubted that such a refusal was a denial of a hearing and, therefore, of due process in the Constitutional sense.

These contradictions regarding the due process clause of the Constitution are substantially affecting the rights of every civil litigant in California. Harmony and uniformity of decision need to be restored so that we can truly say "*With liberty and justice for all.*"

II. The issue of depriving a civil litigant who is indigent and proceeding in forma pauperis of his due process right under the Constitution is an issue of great significance and public concern, which affects the rights of every civil indigent litigant in the state of California under current conflicting appellate opinions, which contradict the U.S. Supreme Court, as well as the California Supreme Court's long-standing precedent of guaranteeing that no citizen shall be denied an opportunity to commence, prosecute or defend an action, civil or criminal, in any court of the United States, solely because his poverty makes it impossible for him to pay or secure the costs.

This U.S. Supreme Court and the California Supreme

Court make it abundantly clear that poor litigants shall have the same opportunity to be represented by **(court appointed)** counsel as litigants in more fortunate financial circumstances. (*Adkins v. E.I. Dupont de Nemours & Co.* 335 US 331-344) In the present case, the Court of Appeal reached a contrary conclusion, stating that the due process clause of the Constitution does not guarantee or embrace such a right. This long-standing precedent has been severely challenged by the opinion of the appellate court already stated herein.

These matters of conflicting opinion regarding these public policies are significantly affecting the administration of justice and the rights of every **civil indigent** litigant in the State of California and are denying the due process right of **civil indigent** litigants under the U.S. Constitution.

Federal Statute 28 USCA Section 1915 is a statute regarding proceeding in forma pauperis. In *Adkins v. E.I. Dupont de Nemours & Co. supra*, the U.S. Supreme Court declares that Section 1 of the statute is intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute or defend an action *civil or criminal* **"in any court of the United States"** solely because his poverty makes it impossible for him to pay or secure the **costs.** Not content with this safeguard for the poor in federal courts, congress, in Section 4 of the Act, provided that the court may request any attorney of the court to represent such poor person. Section 3 of the statute specifically states that litigants who make affidavits of poverty shall be entitled to the same court processes and have the same right to the attendance of witnesses and the same remedies as are provided by law in other cases and as pointed out Section 4 of the statute makes it abundantly clear that poor litigants shall have the same opportunity to be represented by counsel as litigants in more fortunate financial circumstances. The statute was intended for the benefit of those too poor to pay in giving security for costs, and it was not intended that they should be compelled

to employ only paupers to represent them.

The California Supreme Court reaffirmed this U.S. Supreme Court declaration. In 1971, the California Supreme Court entertained a request for in forma pauperis status in a dissolution proceeding and ruled that *the right of any indigent to proceed without costs was applicable to all cases in the state.* (*Earls v. Superior Court 6* Cal.3d 109, 114-115)

These appellate court decisions are clearly depriving every **civil indigent litigant** of their right to be represented by court-appointed counsel and hence depriving them of their due process rights under the U.S. Constitution.

These indigent petitioners were further violated by the trial court when, after disposing of their case at the Motion Summary Judgment hearings, at cost hearings, thereafter, even though the judge knew petitioners were ***involuntary pro per litigants proceeding in forma pauperis,*** she granted $50,000 in costs to defendants against each petitioner. (App. D, 45a) This clearly violated the U.S. Supreme Court's declaration in *Adkins, supra*, as well as *Earls, supra*, which states, "*The right of any indigent to proceed without costs was applicable to all cases in the state.*"

These contradictions are substantially affecting the rights of every civil indigent litigant in California. Harmony and unity need to be restored so that we can truly say, "*with liberty and justice for all.*"

CONCLUSION

For all of the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted, March 24, 2007

Olga Ostoposides	Renna Ostoposides
Harry Ostoposides	Socrates Ostoposides

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action.

On March 24, 2007, I deposited into the overnight mail service in Torrance, California three copies to each defendant and 40 copies to the United States Supreme Court.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I declare under penalty of perjury of the laws of the State of California that the above is true and correct.

Executed March 24, 2007, at Los Angeles, California.

_____ _____

Type or Print Name Signature

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